IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 313

JESSE ELLIOTT DOUGLAS,

Petitioner

V.

STATE OF ALABAMA

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHMOND M. FLOWERS
Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

INDEX

TABLE OF CASES

STATUTES CITED

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I

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals of Alabama is reported as *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 61, 163 So. 2d 477, and is set out in full in the Appendix to the petition for a writ of certiorari filed in this Honorable Court.

The case was decided on October 8, 1963. An application for rehearing in the Court of Appeals of Alabama was denied without opinion on November 12, 1963. The petitioner filed a petition for a writ of certiorari in the Supreme Court of Alabama and the writ was denied on March 26, 1964. *Jesse Elliott Douglas v. State of Alabama*, 2nd Division 453, 163 So. 2d 496. An application for rehearing in the Supreme Court of Alabama was denied without opinion, on April 30, 1964.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from this Honorable Court to review the judgment of the Court of Appeals of Alabama, rendered October 8, 1963, rehearing denied November 12, 1963, under the provisions of Title 28, Section 1257(c), United States Code, Judiciary and Judicial Procedure. (See petitioner's brief, pages 1 and 2.)

III

QUESTIONS PRESENTED

The petition in this case raises the following issues:

1. Whether the petitioner, who stands convicted in a State court of assault with intent to murder, was denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States by virtue of the fact that the prosecutor was allowed to question an accomplice as a witness for the State at petitioner's trial concerning the contents of a written statement made by the accomplice to law enforcement officers.

2. Whether said petitioner was denied such due process of law by virtue of the fact that the State appellate court refused to consider matters dehors the record and refused to allow the petitioner, who is charged with the duty of presenting a correct record to the court, to amend the record after it was filed in such court.

IV

CONSTITUTIONAL PROVISION INVOLVED

Petitioner alleges a denial of rights guaranteed to him by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT OF THE CASE

Petitioner was indicted by a Grand Jury of Dallas County, Alabama, for the offense of assault with intent to murder. Title 14, Section 38, Code of Alabama 1940, as Recompiled 1958. After hearings thereon, petitioner's motion to quash the indictment and his motion for a continuance were overruled. Upon arraignment a plea of not guilty was entered and trial was had before a jury which returned a verdict of guilty as charged in the indictment. In accordance with the verdict of the jury, the trial court rendered an adjudication of guilt and sentenced petitioner to imprisonment for a period of twenty years, whereupon notice of appeal was given. Subsequently, the trial court overruled petitioner's motion for a new trial.

Prior to the introduction of any evidence on the merits, hearings were conducted on petitioner's motion to quash the indictment and on his motion for a continuance. The State pleaded the general issue to the motion to quash, and the testimony of three grand jurors who returned the indictment was introduced. The testimony of these witnesses tended to show that when the case was presented to the grand jury, the Sheriff of Dallas County, Alabama, testified before said jury and there was exhibited a statement which had been signed voluntarily by an alleged accomplice of petitioner; together with a shotgun shell hull. Petitioner's attorney was not allowed to inquire into the details of the evidence presented to the grand jury.

The only evidence introduced at the hearing on the motion for a continuance were several newspaper articles in which were reported the trial of petitioner's alleged accomplice.

This case arises out of the shooting of a truck driver in Dallas County, Alabama, near the intersection of Highway 5

and Highway 80, at approximately 2:30 a. m., January 18, 1962.

The evidence tends to show that about midnight on January 17, 1962, one C. L. Warren, who was employed by West Brothers Motor Express and who was a member of Teamsters Union, Local 612, left Birmingham driving a Bowman Transportation Company tractor-trailer type transport truck. He was headed South through Alabama, his destination being New Orleans, Louisiana. There were other trucks making this same trip, and one Edward Gorff was driving a truck immediately behind the one driven by Warren.

After leaving a truck stop near Centreville, Alabama, Warren and Gorff noticed a 1959 Ford Galaxie, which carried a Jefferson County, Alabama, license plate, as it passed them, headed South in the same direction as their two trucks. Gorff noticed that this Ford's right tail light was not burning and that a black object lay on its back window shelf. A short time after this car had passed the trucks, a car of the same description was seen by Gorff headed North toward Warren and him. As this car met Warren's truck, there were fired from the car shots which hit the truck and also hit Warren in the arm and in the chest. Gorff stopped his truck to assist Warren and to see that he received medical attention. Warren was hospitalized for twelve days, during most of which time he was in a critical condition.

State Highway Patrolman J. E. Williamson testified that on January 18, 1962, he set up a road block at the intersection of Highway 5 and Highway 11 in Bibb County, Alabama, and checked all vehicles for weapons because a man had been shot with a rifle. At 5:00 a. m., he stopped a four-door 1959 white Ford automobile occupied by petitioner, who was a passenger, and one Olen Ray Loyd, who was the driver. Williamson, who found a shotgun and a small box of high

velocity shells in the automobile, made a record of his findings and allowed the automobile, which bore an Etowah County, Alabama, license tag, to proceed on its way. As the car was driven off, Williamson noticed that it had only one tail light burning. Later that day in Anniston, Alabama, he checked an automobile and identified it as the one in which petitioner and Loyd had been riding when they were stopped by him at the road block.

At approximately 8:00 a.m., January 18, 1962, after an alert for the car had been broadcast, petitioner and Loyd were stopped, but were not arrested, by a police officer in Ohatchee, Calhoun County, Alabama, and were taken by patrol officers to the State Highway Patrol office in Anniston, Alabama, where they were held for the Dallas County, Alabama, sheriff. There it was found that a Jefferson County, Alabama, license plate had been placed under the front floor mat on the driver's side of the car. This car, which was a white 1959 Ford Galaxie, the right tail light of which was disconnected, bore an Etowah County, Alabama, tag and had on its back window shelf an umbrella. Other articles, including three guns and shotgun shells, were also found in various parts of the car.

Petitioner and Loyd were taken from Anniston, Alabama, to Birmingham, Alabama, where they were turned over to the Sheriff of Dallas County, Alabama, who had warrants for their arrest. They were then taken to Selma, Alabama, and placed in the county jail.

The Ford automobile in which petitioner was riding when he was stopped in Calhoun County, Alabama, was brought to Montgomery, Alabama, and there examined by a State criminalist. At the trial a large number of pictures of the automobile and many articles, including two shotguns and a license plate, which were taken from the automobile, were introduced into evidence.

A shotgun shell hull, which had been fired from a gun found in petitioner's car, was found in the vicinity of the crime by local law enforcement officers and was introduced into evidence by the State.

The State of Alabama called Olen Ray Loyd as a witness against the petitioner. On the day preceding the petitioner's trial, a jury had found Loyd guilty of assault with intent to murder. He was asked twenty-one questions concerning the entire contents of a statement shown to have been made voluntarily to law enforcement officers at the Dallas County, Alabama, jail. He refused to answer these questions on constitutional grounds and refused to affirm or deny that he had made said statement.

According to Loyd's statement or confession, on the night of January 17, 1962, he and petitioner went from Gadsden, Alabama, to Birmingham, Alabama, where they were instructed to fire upon the tractors pulling Bowman Transportation Company trailers which were traveling from Birmingham through South Alabama, inasmuch as Teamsters Union, Local 612, of which they were members, was on strike against Bowman. In Birmingham, Loyd was given a Jefferson County, Alabama, license plate to place on his automobile and he was also furnished a tank full of gasoline, both by one Sam Webb, President of Teamsters Union, Local 612. Loyd and petitioner left Birmingham at about the same time that the trucks started their trip to New Orleans, Louisiana, and they saw these trucks several times, but did not fire upon them until they were in Dallas County, Alabama. At the time the shot which hit Warren and his tractor was fired, Loyd was driving the automobile and the gun was fired by petitioner.

A qualified criminalist, trained in firearms identification, testified that ammunition found in Loyd's car contained similar elements in the same proportions as the ammunition frag-

ments found inside the cab of Warren's tractor and in his body; that the shotgun shell hull found in the vicinity of the crime had been fired from a gun found in Loyd's car; and that test firings indicated that the shots which hit Warren's tractor had been fired from a distance of not greater than eight feet

After Loyd left the witness stand, the State of Alabama called four law enforcement officers who testified that Loyd's statement was given and signed voluntarily in their presence. Petitioner did not offer any evidence in his own behalf.

VI.

ARGUMENT

A.

The State prosecuting attorney may, without depriving the accused of due process of law, question an accomplice concerning the contents of a confession made by the accomplice to law enforcement officers.

In this case, Loyd, an accomplice, was convicted the day before the petitioner was put to trial. He was called as a witness against the petitioner.

In examining Loyd the prosecuting attorney confronted him with his purported written statement after he was declared a hostile witness and asked twenty-one questions concerning the contents of said statement. These questions covered the entire statement. Loyd refused to answer the questions invoking his privilege against self incrimination. See *Ex parte Loyd* (*Ala.*), 155 So. 2d 519.

As was held by the Court of Appeals of Alabama in this case, it is within the discretion of the trial court to allow a party to refresh the memory of a hostile witness by calling his attention to a prior statement.

Since Loyd's privilege against self incrimination was personal, the petitioner had no right to invoke such privilege. *Namet v. United States*, 373 U. S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278. Cf. *Beck v. Washington*, 369 U. S. 541, 82 S. Ct. 955, 8 L. Ed. 2d 98.

A witness who has been convicted of a crime arising out of the transaction in question may no longer claim the privilege against self incrimination and may be compelled to testify. *United States v. Cioffi*, 242 Fed. 2d 473; *United States v. Romero*, 249 Fed. 2d 371; and *United States v. Gernie*, 252 Fed. 2d 664, cert. denied, 356 U. S. 968, 78 S. Ct. 1006, 2 L. Ed. 2d 1073.

The petitioner in this case suggests that the prosecuting attorney knowingly called Loyd to the stand for the purpose of wringing from him a refusal to testify. It is respectfully submitted that the record in this case does not justify petitioner's position. Every trial attorney knows that it is impossible to predict the testimony of a convicted accomplice.

It should here be pointed out that the attorney representing the petitioner and Loyd at the time of the trial of the case at bar, while objecting to the use of Loyd's statement prior to the examination of the witness, did not object to the questions propounded to Loyd concerning the contents of said statement. After Loyd refused to answer all twenty-one questions, said attorney moved the trial court to allow Loyd to purge himself of possible contempt.

After Loyd left the witness chair the State examined two local law enforcement officers and an agent of the Federal Bureau of Investigation without objection. These witnesses testified that Loyd gave the statement, used by the prosecuting attorney, in their presence on January 20, 1962. The State

did not attempt to introduce said statement into evidence at the petitioner's trial.

In this state of the record, we respectfully submit that there was no denial of petitioner's right to due process of law. Error cannot be predicated upon adverse rulings of the trial court where the specific grounds of objection are not apt, unless the evidence sought is inadmissable for any purpose. *Ellis v. State*, 38 Ala. App. 379, 86 So. 2d 842; *Pope v. State*, 39 Ala. App. 42, 96 So. 2d 441; *Robinson v. State*, 40 Ala. App. 101, 108 So. 2d 188; and *Nichols v. State*, 267 Ala. 217, 100 So. 2d 750.

This Honorable Court has held that a state may regulate the procedure of its courts in accordance with its own concept of policy and fairness, unless it offends some principle of justice ranked as fundamental.

This Honorable Court has also held that the privilege against self incrimination is not inherent in the right to a fair trial and is, therefore, not protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States. See *Adamson v. California*, 232 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903.

For the above reasons we respectfully submit that no principle of fundamental justice was offended by the rulings of the trial court in the instant case. We submit that the State of Alabama may examine a convicted accomplice concerning the contents of a prior written statement made by him without violating the due process clause of the Fourteenth Amendment to the Constitution of the United States.

B.

The petitioner was not denied due process of law because the Court of Appeals of Alabama refused to consider matters dehors the record and refused to allow an amendment to the record after it was filed in said Court. See *Wolfe v. North*

Carolina, 364 United States 177, 80 Supreme Court 1482, 4 L. Ed. 2d 1650.

In Alabama an appellant is charged with the duty of presenting a correct record to the appellate court. *Rushing v. State*, 40 Ala. App. 361, 113 So. 2d 527; and *Weldon v. State*, 21 Ala. App. 357, 108 So. 270.

A denial of due process of law is not shown in this case where the attorneys for the petitioner alleged that they did not know the contents of the record on appeal prior to the filing of said record in the Court of Appeals of Alabama (See petitioner's brief, page 12).

The judgment of the trial court in the case at bar was written by the trial judge and certified by him (R. pp. 6 and 7). For a full understanding of the reason for this procedure, see Ex parte Loyd (Ala), 155 So. 2d 519.

Under the usual procedure in Alabama, the clerk of the circuit court prepares the formal judgment of conviction from minute entries after the jury has found the accused guilty and the judge has orally pronounced sentence. If the clerk of the court is authorized to prepare the formal judgment, we respectfully submit that the circuit judge may prepare such judgment without denying to the accused his right to due process of law.

The record filed in this Honorable Court does not support petitioner's allegation that Alabama provides no procedure for the corrrection of an erroneous record on appeal. Petitioner's motion in the Court of Appeals of Alabama, entitled, "Motion of Appellant to Strike Portions of the Transcript of Record, for the Discharge of Appellant, and for Alternative Relief," which is a part of the record in this Honorable Court, was denied because petitioner failed to allege or show that the formal judgment did not represent

what actually transpired. There was no allegation that the judgment entry was untrue.

Contrary to the argument found on pages 11 and 12 of petitioner's brief, petitioner was arraigned in open court upon the indictment charging the offense of assault with intent to murder (R. p. 6).

Where the affirmance of a conviction in a state court is rested upon an adequate ground under state criminal procedure, this Honorable Court has held that no question of the denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States is presented. *Edelman v. California*, 344 U. S. 357, 73 S. Ct. 293, 97 L. Ed. 387. Cf. *Hedgebeth v. North Carolina*, 344 U. S. 806, 68 S. Ct. 1185, 92 L. Ed. 1739.

For these reasons we respectfully submit that there was no denial of petitioner's right to due process of law in connection with his arraignment upon the indictment or the judgment of conviction entered against him.

VII

CONCLUSION

Premises considered, we respectfully submit that there was no denial of the petitioner's right to due process of law in this case. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

RICHMOND M. FLOWERS
Attorney General of Alabama

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

CERTIFICATE

I, Paul T. Gish, Jr., one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of September 1964, I served a copy of the foregoing brief and argument in opposition to petition for writ of certiorari on one of the attorneys for the petitioner, by mailing a copy in a duly addressed envelope, to said attorney of record as follows:

To: Charles Cleveland
Attorney at Law
Fifteenth Floor Empire Building
Birmingham, Alabama 35203

PAUL T. GISH, JR.
Assistant Attorney General
of Alabama
Administrative Building
Montgomery, Alabama 36104